LIBRARY
PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 19 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 854

RANDOLPH PHILLIPS, NINA PHILLIPS, SAMUEL J. PHILLIPS, PATRICIA N. BERMAN and ELIZABETH BOBRICK in their own right individually and as members of THE COMMITTEE FOR FAIR PLAY FOR VOTERS,

Appellants,

-v-

NELSON A. ROCKEFELLER, Governor of the STATE OF NEW YORK, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

Appeal from the United States District Court for Southern District of New York

JURISDICTIONAL STATEMENT

ROBERT L. BOBRICK
Attorney for Appellants
345 Eighth Avenue
New York, N. Y. 10001

RANDOLPH PHILLIPS
Appellant Pro Se
30 East 72nd Street
New York, N. Y. 10021

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	4
Statement of the Case	5
Questions are Substantial	7
Conclusion	8

Case Citations

Reynolds v. Sims, 377 U.S. 533 (1964)	3
Wesberry v. Sanders, 376 U.S. 1	8

Constitution

United States Constitution, Amendment XVII	4

Statute Citations

New York Election Law, Section 296	3
New York Election Law, Section 191	4

In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. ————

RANDOLPH PHILLIPS et al.,

Appellants,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT for SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

The Appellants pursuant to Rules 13 (2) and 15 of the Supreme Court of the United States, files this statement as to jurisdiction to contend that this Court has jurisdiction on direct appeal to review the final order dismissing plaintiff's complaint for an injunction and declaratory relief, and to secure an order of this court noting probable jurisdiction in this case.

Opinions Below

The district court delivered two opinions in this case. The majority opinion, written by the Hon. J. EDWARD LUMBARD, Chief Judge of the United States Court of Appeals for the Second Circuit, dismissed the complaint.

The dissenting opinion by Marvin E. Frankel, District Judge of the Southern District of New York, held that "N. Y. Election Law § 296, together with defendants' action under it (appointing a United States Senator instead of electing one to succeed to the seat of the late Robert F. Kennedy) must be declared invalid under the Seventeenth Amendment." Both opinions are printed in "Statement As to Jurisdiction, Appendix A" in Valenti v. Rockefeller, No. 773, October Term, 1968. * That reprint, except for omitting the caption of this case and of Backer v. Rockefeller, 68 Civil 2988, SDNY, is a correct reproduction of the opinions herein which were simultaneously filed in all 3 cases, and appellants therefor adopt as their appendix the same Appendix A in Valenti v. Rockefeller. (See Rule 15(3)).

JURISDICTION

This is an appeal from a final order dismissing the complaint which was filed under the Seventeenth Amendment to the Constitution of the United States and was determined by a statutory three-judge court convened pursuant to 28 U. S. C. §§2281 and 2284. The complaint alleged that New York Election Law § 296 violated said amendment and sought declaratory and injunctive relief. The order sought to be reviewed is dated November 13, 1968 and was entered on the same day. Notice of Appeal was filed on December 10, 1968 in the United States District Court for the Southern District of New York. This Court has jurisdiction to review the final order herein by direct appeal pursuant to 28 U. S. C. § 1253.

---

* As stated by Chief Judge Lumbard: "Duplicate originals of this opinion are being filed in the Western District of New York and in the Southern District of New York." - Valenti, Appendix A to Statement as to Jurisdiction, No. 773, at p. A32.

The following decision sustains the jurisdiction of the Supreme Court to review this order on direct appeal. *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

The validity of Section 296 of the Election Law of the State of New York is involved, as amended by the terms of Section 191 (a) of the Election Law. Their texts follow:

Section 296.

United States senators. — At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall primary election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment.

Section 191.

Dates of Primary Elections and General Elections; Time of Opening and Closing Polls.

1.a. A primary election, to be known as the spring primary, shall be held in the year 1966 and annually thereafter, on the third Tuesday in June before the general election. All of the provisions of law relating to the spring and fall primary elections shall apply to the spring primary election provided for by this paragraph as hereby amended. All references to the spring and fall primary elections contained in this chapter shall be construed as references whenever appropriate and applicable, to such spring primary election.

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: PROVIDED, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

QUESTIONS PRESENTED

1. Did New York State's Legislature in enacting Section 296 of the Election Law violate Amendment XVII to the Constitution of the United States by vesting

in the Executive the power to make a 29 months "temporary appointment" (from June 7, 1968 to December 1, 1970) and by vesting in "the people" (8,000,000 registered voters) the right to elect a Senator of their own choosing for only 1 month (December 1, 1970 to January 3, 1971) where the total unexpired term of the late Senator Robert F. Kennedy was 30 months?

2. Where the Executive of the State of New York did not make any "temporary appointment" of a Senator to "fill the vacancy" occurring on June 6, 1968 and waited until September 10, 1968 to make an "appointment" had his power so to do lapsed under Amendment XVII to the Constitution?

3. Did Chief Judge Lumbard and Judge Henderson violate their judicial obligation under Rule 65 of the Federal Rules of Civil Procedure to the 8,000,000 registered voters upon whose behalf plaintiffs sued by delaying denial of the application for preliminary injunction until it had become moot?

STATEMENT OF THE CASE

On June 6, 1968 Robert F. Kennedy, junior United States Senator from the State of New York, died as a result of bullet wounds. Defendants herein took none of the steps required by Amendment XVII to the Constitution of the United States "to fill the vacancy" either by appointment or election.

Therefor, on July 17, 1968 appellants herein filed their complaint in the United States District Court for the Southern District of New York attacking the inaction of defendants, seeking a declaratory judgment that Section 296 of the Election Law of the State of New York violated Amendment XVII, and mandatory injunctive relief to compel defendants to "issue the writs of election" required by the Amendment.

Unknown to appellants herein at the time a somewhat similar complaint had been filed the day previously in Valenti v. Rockefeller, supra, in the Western District, and the day after the filing of the complaint herein a third somewhat similar action was also filed in the Southern District of New York. (Backer v. Rockefeller).

Thereupon Chief Judge Lumbard convened a statutory three judge court, at the request of the District Judges before whom the three actions had been filed, and consolidated all three cases for hearing and for decision. After oral argument on August 7, 1968 and while the cases were sub judice, defendant the Honorable Nelson A. Rockefeller, as Governor of the State of New York, appointed Representative Charles Goodell to "fill the vacancy".*

The national and general State of New York elections were held on November 5, 1968. On November 13, 1968 the three-judge court filed its opinions, Chief Judge Lumbard, with District Judge Henderson, concurring, upholding defendants' motion to dismiss the complaints, and District Judge Frankel dissenting.

The court's majority members so long withheld their denial of the application for preliminary injunction that it became non-appealable and mooted the prayer for a November, 1968 election by "the people". But a judgment by this Court reversing the judgment below would make possible an election for the Senate seat at the November, 1969 election. Or at an earlier special election by order of this Court.

* It would seem obvious that Representative Goodell took the Senate seat, to which he was appointed on September 10, 1968, with notice of the pending application for injunction. He is subject to the order of this Court under Rule 65(d), F. R. C. P.

Defendants' contention that all issues herein are moot by virtue of Representative Goodell's appointment 90-days after the vacancy occurred are without merit. Section 296 of the Election Law of the State of New York is not a moot statute and is still the law of that State. A prompt determination of the issues herein by this Court would, if favorable to appellants' contentions, enable under such equitable principles as this Court has the power to require, ample time to be provided for the nomination of candidates and for the holding of primaries.

Under the procedure adopted by defendants, including for unexplained reasons in the record herein, the extraordinary 90-day delay in making the "temporary appointment", "the people", namely 8,000,000 registered voters will elect for a 1-month term extending from December 1, 1970 to January 3, 1971, their Senator. Defendant Rockefeller will by contrast have made a "temporary appointment" which counting the elapsed time to his appointment extends for 29 months of an unexpired 30-months term.

Clearly for the cogent reasons expressed in the dissenting opinion below such acts violated Amendment XVII

THE QUESTION IS SUBSTANTIAL

The decision below disenfranchises 8,000,000 registered voters for the State of New York from electing their junior Senator for 29 months out of an unexpired term of 30 months while legalizing the Governor's appointment for 29 months and "the people's" election for only 1-month. Such a distortion of Constitutional and democratic principles violates the standards repeatedly declared by this

Court in such cases as Baker v. Carr, 369 U. S. 186, Wesberry v. Sanders, 376 U. S. 1 and Reynolds v. Sims, 377 U. S. 533.

The question presented is thus so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, unless this Court in its wisdom should summarily reverse on the basis of the learned dissenting opinion herein.

CONCLUSION

Appellants respectfully pray that this Court note probable jurisdiction and place the case upon its calendar for argument.

Respectfully submitted,

ROBERT L. BOBRICK
Attorney for Plaintiffs
345 Eighth Avenue
New York, N. Y. 10021

RANDOLPH PHILLIPS
Appellant Pro Se
30 East 72nd Street
New York, N. Y. 10021
212-Re 7-0244; Re 4-6776